FILED BY CLERK
JAN 25 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. PHILLIP MUSGROVE, Appellant.	2 CA-CR 2008-0409 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074333

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART;
MODIFIED, VACATED, AND REMANDED IN PART

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Phillip Musgrove was convicted of the following charges stemming from an automobile accident: two counts of manslaughter, three counts of aggravated assault with a dangerous instrument, three counts of aggravated assault causing serious physical injury, one count of aggravated criminal damage in an amount of $10,000 or more, and nineteen counts of endangerment involving a substantial risk of imminent death. The trial court sentenced him to a combination of consecutive and concurrent prison terms that totaled thirty-six years.

¶2 On appeal, Musgrove contends his conviction for criminal damage must be vacated because the count was not amended properly, his use of the car did not permit the jury to find it was a dangerous instrument, and the sentences imposed are excessive given the facts of the case. He also argues the trial court erred in excluding his statements made after the accident, admitting into evidence inflammatory photographs, denying his requested jury instructions, and denying his request for a change of venue. For the reasons set forth below, we modify his conviction for criminal damage, vacate his sentence on that count, and remand for resentencing. We affirm the remainder of Musgrove's convictions and sentences.

Factual and Procedural Background

¶3 On appeal, we view the evidence in the light most favorable to upholding the jury's verdicts, drawing all reasonable inferences from the evidence against the defendant. *See State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997). On November 3, 2007, Musgrove caused a vehicular accident at an intersection in Tucson that left two people

dead and three others seriously injured. As he approached a red light at Speedway Boulevard and Campbell Avenue, Musgrove drove between two rows of cars that were already stopped, scraping and damaging several of them as he passed between the lanes, and proceeded into the intersection where he struck two vehicles and caused a third to be hit. Musgrove admitted to driving in excess of the speed limit, and his speed during the first collision was estimated to be about eighty-five miles per hour. He did not appear to have applied the brakes beforehand.

¶4 Blood tests showed that then twenty-two-year-old Musgrove was not under the influence of drugs or alcohol at the time of the accident. He admitted to police officers that he was the driver and had "messed up." At trial, Musgrove testified he may have fallen asleep while driving and recalled approaching the intersection but had no memory of driving between the two lanes of traffic or of the ensuing accident.

¶5 The two lanes of traffic were occupied by four vehicles each. Given the dimensions of his car, the maximum clearance between Musgrove's vehicle and the others was slightly more than one foot. At the narrowest point, his car was slightly wider than the space between the other vehicles.

¶6 Although Musgrove was charged with two counts of second-degree murder, he was acquitted of these charges and found guilty, instead, of two counts of manslaughter, the lesser included offense. The jury found him guilty of the other twenty-six offenses as noted above. In its special verdict form, the jury found as aggravating circumstances both

that Musgrove's crimes had resulted in multiple deaths and that he had caused emotional harm to at least one victim. Except for the criminal damage charge, the jury found all of Musgrove's offenses to be of a dangerous nature because they involved a dangerous instrument, specifically the car Musgrove had been driving.

¶7 The trial court sentenced Musgrove to enhanced, consecutive, presumptive prison terms of 10.5 years for each of the manslaughter counts. The court likewise imposed enhanced, consecutive, presumptive prison terms of 7.5 years for two of the three counts of aggravated assault with a dangerous instrument. Musgrove received concurrent prison terms for the remainder of his charges. The total term of imprisonment imposed was thirty-six years. This appeal followed.

Criminal Damage

¶8 Musgrove first argues his conviction for criminal damage should be set aside because the indictment was not amended properly to charge this offense. Count eight of the original indictment alleged:

> On or about the 3rd day of November, 2007, Phillip nmn Musgrove defaced, damaged or tampered with (a utility and/or agriculture infrastructure or property and/or a construction site and/or existing structure) for the purpose of obtaining nonferrous metals, in an amount of $10,000 or more, belonging to Bita C[.] and/or Zachar[y] S[.] and/or Nargis N[.] and/or Joey W[.] and/or Arturo C[.] and/or Randal P[.] and/or Jose G[.], and/or Edith M[.] and/or Lawrence A[.] and/or Barbara C[.] and/or Alamo Rental, in violation of A.R.S. §[§] 13-1604(A)(4) and (B)(3), 13-603, 13-604(F) and (P), 13-604(A) and (C), 13-701, 13-702, 13-702.01, 13-702.02, 13-801, 13-804, and 13-811.

¶9 The state filed a motion to amend the indictment before trial, asserting the original count eight was erroneous as a result of a typographical error. The state included with its motion an excerpt of the grand jury transcript that showed the evidence presented to the grand jury related to "the amount of damage done to the various vehicles involved in th[e] collision" and did not involve the theft of nonferrous metals. The state proposed amending count eight to read as follows:

> On or about the 3rd day of November, 2007, Phillip nmn Musgrove recklessly damaged the property of Bita C[.] and/or Zachary S[.] and/or Nargis N[.] and/or Joey W[.] and/or Arturo C[.], and/or Randal P[.] and/or Barbara C[.], and/or Alamo Rental, in an amount of $10,000 or more, in violation of A.R.S. §§ 13-1602(A)(1) and (B)(1) . . . [.]

¶10 Although no trial court ruling on that motion appears in the record, on the first day of trial the jury was instructed on the amended version of count eight the state had proposed. After reading the amended charge, the court explained, "[W]hat that means is that the vehicles that were involved in the collision were damaged. You'll have to decide whether or not that's accurate and what the value of the vehicles was to have them repaired or replaced." The parties later stipulated that the costs to repair the vehicles damaged in the accident exceeded $10,000. At no point did Musgrove object to the indictment or the propriety of its amendment below.

¶11 Because Musgrove challenges the indictment for the first time on appeal, he has forfeited review for all but structural or fundamental error. *See State v. Fimbres*, 222 Ariz. 293, ¶ 33, 213 P.3d 1020, 1029 (App. 2009). Musgrove has not asserted the error is

structural. Instead, he claims the error deprived the court of subject matter jurisdiction over the amended offense. For the reasons specified in *Fimbres*, 222 Ariz. 293, ¶¶ 28-33, 213 P.3d at 1028-29, we reject this argument as well as Musgrove's contention that *Fimbres* was wrongly decided. "[S]ubject matter jurisdiction is established when the indictment is filed, and, once established, cannot be lost as a result of later events." *Id.* ¶ 33 (citation omitted).

¶12 In order to prevail under the fundamental error standard, Musgrove must show that error occurred, that the error was fundamental, and that he suffered prejudice as a result. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). Because Musgrove has asserted "[t]here is no fundamental error because there was notice and therefore no prejudice," he has not sustained his burden under *Henderson*, and we need not address the issue further. *See State v. Flythe*, 219 Ariz. 117, ¶¶ 4, 11, 193 P.3d 811, 813, 814 (App. 2008); *see also* Ariz. R. Crim. P. 13.5(e) (any issue regarding defect in charging document must be raised before trial pursuant to Rule 16, Ariz. R. Crim. P.).

¶13 However, the conviction for criminal damage was designated a class three felony, as it had been charged originally, rather than a class four felony, which it was following the amendment. *See* § 13-1604(A)(1), (B)(1)(a) (damage to personal property in amount of $10,000 or more constitutes class four felony). The incorrect classification of this offense constitutes fundamental, prejudicial error. *See State v. Rushing*, 156 Ariz. 1, 4-5, 749 P.2d 910, 913-14 (1988). We therefore modify Musgrove's conviction to reflect the correct classification as amended, vacate his sentence on this count, and remand for resentencing.

See State v. Fernandez, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) ("[W]e will not ignore [fundamental error] when we find it.").

Dangerous Instrument

¶14 Musgrove next challenges the validity of his enhanced sentences pursuant to the former A.R.S. § 13-604.[1] Specifically, he contends "[t]he jury was improperly permitted to determine that the offenses were committed with a dangerous instrument when [he] was in fact using a car to drive himself home, rather than to intentionally or knowingly injure or kill anyone." We disagree.

¶15 Section 13-604(F) and (I) provided for the imposition of an enhanced sentence for certain felonies "involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." 2007 Ariz. Sess. Laws, ch. 287, § 1. A "[d]angerous instrument" is "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." A.R.S. § 13-105(12).[2] Musgrove does not dispute that a motor vehicle may be a dangerous instrument, *see State v. Orduno*, 159 Ariz. 564, 566, 769 P.2d 1010, 1012 (1989), but argues we should interpret § 13-604 to

[1]We cite the version of the statute in effect when Musgrove committed his offenses, as found in 2007 Ariz. Sess. Laws, ch. 287, § 1.

[2]We cite the current version of this statute, as it has not materially changed. *See* 2006 Ariz. Sess. Laws, ch. 73, § 1.

require the intentional or knowing—as opposed to the negligent or reckless—use of a motor vehicle as a dangerous instrument in order to support sentence enhancement.

¶16 Musgrove recognizes that this court has repeatedly rejected that interpretation of the statute, *e.g.*, *State v. Garcia*, 165 Ariz. 547, 552-53, 799 P.2d 888, 893-94 (App. 1990); *State v. Venegas*, 137 Ariz. 171, 175, 669 P.2d 604, 608 (App. 1983), but he asserts those cases were decided incorrectly. He also acknowledges that in the analogous context of negligent child abuse, this court has held that the use of a dangerous instrument need not be intentional or knowing under the former § 13-604. *See State v. Tamplin*, 146 Ariz. 377, 378, 379-80, 706 P.2d 389, 390, 391-92 (App. 1985). And, this court more recently rejected an argument similar to Musgrove's when interpreting analogous provisions of former A.R.S. § 13-702(G). *See State v. Garcia*, 219 Ariz. 104, ¶¶ 3-5, 8, 13-14, 193 P.3d 798, 799, 800, 801 (App. 2008) (interpreting the phrase, "'involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument,'" to preclude trial court from designating as misdemeanor "those [class six felony offenses] that involve[d] 'the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument' regardless of whether committed intentionally or knowingly"), *quoting* 2005 Ariz. Sess. Laws, ch. 166, § 1 (former § 13-702(G)).

¶17 We see no compelling reason to depart from these decisions. Moreover, given our courts' interpretation of the statutory terms "dangerous instrument" and the legislature's subsequent amendment of § 13-105 without changing that language, we presume the

legislature has ratified this construction. *See Hancock v. Bisnar*, 212 Ariz. 344, ¶ 23, 132 P.3d 283, 288 (2006). The principle of *stare decisis* therefore applies with particular force. *See Galloway v. Vanderpool*, 205 Ariz. 252, ¶¶ 17-18, 69 P.3d 23, 27-28 (2003). Accordingly, we find no error in the jury's findings or the imposition of enhanced sentences.

Excessive Sentences

¶18 Musgrove argues his aggregate sentences are excessive given the facts of his case and asks this court to reduce them pursuant to A.R.S. § 13-4037(B), which authorizes this court to modify legally imposed sentences that are excessive. *State v. Long*, 207 Ariz. 140, n.6, 83 P.3d 618, 626 n.6 (App. 2004). Because the trial court is in the best position to evaluate a defendant convicted of a crime and determine the appropriate sentence for that defendant, *id.*, we exercise this authority with great caution. *State v. Fillmore*, 187 Ariz. 174, 185, 927 P.2d 1303, 1314 (App. 1996). We will uphold a sentence unless it clearly appears from the record that the trial court has abused its broad sentencing discretion. *State v. McDonald*, 111 Ariz. 159, 166, 526 P.2d 698, 705 (1974).

¶19 In support of his argument, Musgrove highlights the mitigating factors in his case, including his family support and responsibilities, the challenging circumstances in which he grew up, and his efforts to be a productive member of society. Yet the trial court weighed these considerations. *See* 2006 Ariz. Sess. Laws, ch. 148, § 2 (former A.R.S. § 13-702.01(H)). Although we acknowledge that some jurists might conceivably have chosen a lesser sentence in light of those factors, we cannot conclude the trial court abused its

discretion in imposing a cumulative thirty-six-year prison term in light of the tragic, senseless crimes Musgrove perpetrated against his victims.

Statements

¶20 Musgrove contends the trial court erred in precluding him from introducing into evidence his statement at the accident scene that he had "messed up."[3] The trial court ruled that the statement was inadmissible hearsay under Rule 802, Ariz. R. Evid. Musgrove contends, as he did below, that the statement did not fit within the hearsay definition because it was not "offered . . . to prove the truth of the matter asserted," Rule 801(c), Ariz. R. Evid., but instead "to show that he had accepted responsibility from the beginning."[4] When offered for the latter purpose, he argues the evidence was "highly probative of his mental state" and "an important part of [his] defense that [he had] acted negligently rather than recklessly." In addition, he asserts the statement was admissible to show his "then existing mental [or] emotional . . . condition" pursuant to Rule 803(3), Ariz. R. Evid.

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[3]Although he also appears to challenge the pretrial ruling barring him from offering his statement that he had been driving the car, the state introduced this admission into evidence, and Musgrove's own testimony established he was the driver and sole occupant of the vehicle. Thus, the issue is moot.

[4]The record is unclear as to when and where Musgrove made the statement that he had "messed up." He contends on appeal that this occurred at the scene of the accident or so soon thereafter that it demonstrated his immediate acceptance of responsibility. But Musgrove stated below, both in his motion in limine and in a hearing, that he had made the statement to a police officer "[l]ater in the hospital" when he was receiving medical treatment. The state apparently concedes the statement was made "shortly after the accident." In any event, the precise timing is not critical to our analysis.

¶21 We review for an abuse of discretion a trial court's ruling on the admission of evidence under exceptions to the hearsay rule. *State v. Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d 110, 118 (2003). Even if an evidentiary ruling is erroneous, a defendant is not entitled to relief if the error was harmless. *See State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008). An error is harmless if a reviewing court may conclude, beyond a reasonable doubt, that it neither contributed to nor affected the jury's verdict. *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). A court may find an error harmless when there is overwhelming evidence of a defendant's guilt. *See, e.g.*, *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004); *State v. Jones*, 185 Ariz. 471, 486, 917 P.2d 200, 215 (1996).

¶22 Assuming *arguendo* that Musgrove's statements were precluded erroneously, any error was harmless. Although Musgrove's post-collision statement that he "messed up" arguably was relevant on the question of whether he had acted "[u]nder circumstances manifesting extreme indifference to human life," an element of second-degree murder, A.R.S. § 13-1104(A)(3), he ultimately was acquitted of that charge.[5] And we cannot fathom, nor does Musgrove articulate, how that statement would assist a jury in deciding whether he had acted recklessly or negligently; either mental state resulting in the death of two persons could be characterized logically as "mess[ing] up." We find beyond a reasonable doubt that the exclusion of his statements did not affect the jury's verdicts.

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[5]The version in effect at the time Musgrove committed the offenses is the same in relevant part. *See* 2005 Ariz. Sess. Laws, ch. 188, § 6.

Photographs

¶23 Musgrove further contends the trial court erred in admitting into evidence two photographs showing a victim's shoe in the street. He argues these photographs were irrelevant, "added nothing" to the sole issue in the case, which was his mental state when committing the offense, and "only served to inflame the jury."

¶24 We review a trial court's decision to admit photographic evidence for an abuse of discretion. *State v. Anderson*, 210 Ariz. 327, ¶ 39, 111 P.3d 369, 381 (2005). In determining the admissibility of such evidence, the court should consider a photograph's relevance, its "'tendency to incite passion or inflame the jury,'" and the probative value of the photograph versus its potential to cause unfair prejudice. *Id.*, *quoting State v. Murray*, 184 Ariz. 9, 28, 906 P.2d 542, 561 (1995); *see also* Ariz. R. Evid. 403 (court may preclude relevant evidence if probative value substantially outweighed by risk of undue prejudice, confusion, or delay).

> Photographs may be relevant "to prove the corpus del[i]cti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state[']s theory of how and why the homicide was committed."

Anderson, 210 Ariz. 327, ¶ 39, 111 P.3d at 381-82, *quoting State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). Courts are not required by Rule 403 to make murder scenes sanitary. *See id.* ¶ 40. "Photographs must not be introduced, however, 'for the sole

purpose of inflaming the jury.'" *Anderson*, 210 Ariz. 327, ¶ 40, 111 P.3d at 382, *quoting State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982).

¶25 The trial court did not abuse its discretion by admitting the challenged photographs. The photographs depicted the location of the fatal injury and helped explain and illustrate testimony regarding the accident. They also corroborated testimony of the state's witnesses. Musgrove testified he was "pretty sure [he] was speeding" before the accident and he was "pretty positive [he] was going faster than 35" miles per hour, implying he was not driving at "highway speed[s]" up to nearly eighty-five miles per hour, as the state's witnesses had variously testified. Photographs of the vehicles involved in the crash, as well as other photographs depicting the aftermath of the accident, were therefore relevant to prove how fast Musgrove was driving at the time of the accident and, by extension, what his mental state was at the time.

¶26 Furthermore, having reviewed the challenged photographs, we conclude they were unlikely to result in unfair prejudice given that their depiction of a shoe in the street was similar to several other photographs showing assorted personal items and articles of clothing in the road as a result of the accident. In sum, the trial court did not abuse its discretion in implicitly concluding the photographs were relevant, probative, and not unduly prejudicial or offered to inflame the jury. Therefore, the trial court did not err when it admitted the photographs into evidence.

Jury Instructions

¶27 Musgrove claims the trial court erred in refusing two of his proposed jury instructions. The first was the definition of civil negligence; the second provided that, pursuant to A.R.S. § 28-753, "[a] person shall not start a vehicle that is stopped, standing or parked unless the movement can be made with reasonable safety." Musgrove contends both instructions were necessary to support his theory of the case that another driver contributed to the cause of the collision, and his own negligence was arguably non-criminal. Although the court declined these requests, it instructed jurors, over the state's objection, that they could "consider the conduct of any driver involved in the collision when determining whether the defendant's acts were reckless."

¶28 We review a trial court's refusal to give a jury instruction for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). Although a party is entitled to an instruction "on any theory reasonably supported by the evidence," a party is not entitled to an instruction when the law is covered adequately by other instructions. *State v. Martinez*, 196 Ariz. 451, ¶ 36, 999 P.2d 795, 804 (2000). A court may refuse an instruction if it potentially is misleading or confusing to the jury. *See State v. Rivera*, 152 Ariz. 507, 517, 733 P.2d 1090, 1100 (1987). No reversible error occurs if the jury instructions, when read as a whole, sufficiently set forth the applicable law. *State v. Barr*, 183 Ariz. 434, 442, 904 P.2d 1258, 1266 (App. 1995).

¶29 Musgrove's proffered instruction concerning § 28-753 was covered by the court's more general instruction that the jury could consider other drivers' actions, including, necessarily, their unsafe actions, when determining Musgrove's criminal liability. The court also properly could have refused the instruction concerning civil negligence on the ground that it had the potential of misleading or confusing the jury, which was to determine Musgrove's criminal culpability, not another driver's civil liability. Moreover, the court correctly instructed the jury on the criminal offenses with which Musgrove was charged, including the lesser included offenses; on the culpable mental states of intent, knowledge, recklessness, and criminal negligence; and on its duty to find all the elements of the crimes beyond a reasonable doubt. Thus, the instructions as a whole sufficiently set forth the applicable law. The court did not abuse its discretion in declining Musgrove's proffered instructions.

Change of Venue

¶30 Musgrove argues the trial court erred in denying his motion for a change of venue. In that motion, he claimed press coverage of his case prevented him from receiving a fair and impartial trial in Pima County. The local newspaper article Musgrove attached to the motion provided that he previously had been charged in two cases involving separate, fatal shootings. He had been acquitted in one case and the charges had been dismissed in the other case. However, Musgrove's codefendant, who was a relative of his, was convicted of murder for the latter shooting and sentenced shortly before the motion was filed.

¶31 At a hearing on the motion, the trial judge noted he had seen articles and television newscasts that often mentioned Musgrove's connection to the homicide committed by his relative, and those reports referred to Musgrove's pending charges relating to the traffic accident. After observing that when "reading the paper . . . sometimes the Court feels like it's reading fiction," the judge found the media coverage regarding Musgrove was "factual." The court then determined the news coverage would not prevent Musgrove from receiving a fair and impartial trial, especially given that a jury questionnaire would be used and the parties would be permitted to conduct extensive voir dire on the issue. When another article was published during Musgrove's trial, the court asked jurors if they had seen anything about the case in the media and the jurors responded they had not.

¶32 Our rules of procedure require a trial court to grant a motion to change the place of a trial when "a fair and impartial trial cannot be had," Ariz. R. Crim. P. 10.3(a), or when the moving party proves that prejudicial pretrial publicity "will probably result in the party being deprived of a fair trial." Ariz. R. Crim. P. 10.3(b). We review for an abuse of discretion a trial court's denial of a motion for a change of venue. *See State v. Davolt*, 207 Ariz. 191, ¶ 51, 84 P.3d 456, 472 (2004). To obtain relief from the trial court's ruling, the appellant has the burden of showing prejudice, *State v. Salazar*, 173 Ariz. 399, 406, 844 P.2d 566, 573 (1992), which may be actual or presumed. *Davolt*, 207 Ariz. 191, ¶ 45, 84 P.3d at 471.

¶33 Prejudice is presumed when media coverage is so "outrageous that it . . . create[s] a 'carnival-like' atmosphere," *State v. Atwood*, 171 Ariz. 576, 631, 832 P.2d 593, 648 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001), such that "the court cannot give credibility to the jurors' attestations, during voir dire, that they could decide fairly." *Nordstrom*, 200 Ariz. 229, ¶ 15, 25 P.3d at 727; *see also State v. Bible*, 175 Ariz. 549, 563, 858 P.2d 1152, 1166 (1993) (presumption warranted when "pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality"). This type of media exposure tends to be uncommon, *see Bible*, 175 Ariz. at 564-65, 858 P.2d at 1167-68, and generally is contrasted with "'primarily factual and non-inflammatory'" reports. *Davolt*, 207 Ariz. 191, ¶ 46, 84 P.3d at 471, *quoting Nordstrom*, 200 Ariz. 229, ¶ 15, 25 P.3d at 727.

¶34 Here, the single newspaper article included in the record was characterized appropriately by the trial court as "factual." Although Musgrove highlights the court's offhand remark that newspapers sometimes resemble fiction, this comment was not applicable to Musgrove's case. Indeed, Musgrove has not established there were any inaccuracies in his pretrial publicity. In sum, neither the article attached to his motion nor the other news reports described by the court created a circus atmosphere. *See Bible*, 175 Ariz. at 567, 858 P.2d at 1170. Nor were they outrageous, unfair, or pervasive. *See Nordstrom*, 200 Ariz. 229, ¶ 15, 25 P.3d at 727. Thus, Musgrove has not demonstrated that

prejudice should be presumed. *See Davolt*, 207 Ariz. 191, ¶ 46, 84 P.3d at 471 (test for presumed prejudice creates "a high standard [that] is rarely met").

¶35 He likewise has failed to establish he actually was prejudiced by the court's ruling. Absent presumed prejudice, "the defendant must demonstrate that the pretrial publicity was actually prejudicial and likely deprived him of a fair trial. To establish actual prejudice, the defendant must show that 'the jurors have formed preconceived notions concerning the defendant's guilt and that they cannot leave those notions aside.'" *Id.* ¶ 49, *quoting State v. Chaney*, 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984) (citation omitted). Musgrove merely argues, "The news reports that [he] had been dismissed from a murder case on a technicality will clearly [a]ffect the juror's [sic] objectivity." But given the lack of evidence that jurors were exposed to the media coverage, Musgrove has fallen far short of demonstrating the jury formed preconceived notions about his guilt as a result. Therefore, the trial court did not abuse its discretion by denying Musgrove's request for a change of venue. *See Davolt*, 207 Ariz. 191, ¶ 51, 84 P.3d at 472.

Disposition

¶36 For the foregoing reasons, we modify the judgment of conviction to reflect that Musgrove was convicted in count eight of aggravated criminal damage in an amount of $10,000 or more, a class four felony. *See* Ariz. R. Crim. P. 31.17(d); *State v. Rushing*, 156 Ariz. 1, 5, 749 P.2d 910, 914 (1988); *State v. Wolter*, 197 Ariz. 190, ¶ 15, 3 P.3d 1110, 1113 (App. 2000). We also vacate his sentence on that count and remand this matter for

resentencing. *See Rushing*, 156 Ariz. at 5, 749 P.2d at 914; *Wolter*, 197 Ariz. 190, ¶ 15, 3 P.3d at 1113. Musgrove's remaining convictions and sentences are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge